Filed 3/22/19 P. v. Melendez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HENRY ERNESTO MELENDEZ, Defendant and Appellant.	F074520 (Super. Ct. No. BF162648A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Ross Thomas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez, Nick Fogg, Amanda D. Cary and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Henry Ernesto Melendez was found guilty in count 1 of residential burglary (Pen. Code, § 460, subd. (a))[1], in count 2 of attempted first degree robbery (§§ 664/212.5, subd. (a)), and in count 3 of assault with a semiautomatic firearm (§ 245, subd. (b)). Various special allegations were found true: as to all counts, that Melendez wore body armor during the commission of the offense (§ 12022.2, subd. (b)); as to count 1, that another person was present making the offense a violent felony (§ 667.5, subd. (c)(21)); as to count 2, that Melendez personally used a firearm (§ 12022.53, subd. (b))[2]; and in counts 1 and 3, that Melendez personally used a firearm (§ 12022.5, subd. (a)). Melendez received a total prison sentence of 18 years.

On appeal, Melendez contends the trial court abused its discretion when it denied his motion to dismiss the jury venire. He also contends the trial court erred when it instructed with CALCRIM No. 361. In supplemental briefing, Melendez asks that we remand his case to allow the trial court to exercise its discretion under section 12022.5, subdivision (c) to strike the section 12022.5, subdivision (a) firearm enhancement.

We remand for resentencing, but in all other respects affirm.

STATEMENT OF FACTS

On December 14, 2015, Daniel Cervantes brought home an eight-pound bag of marijuana from the marijuana collective where he worked. Early the following morning, two masked men broke into the home while the Cervantes family slept. The noise woke Cervantes, who grabbed a handgun from his nightstand when he saw the men run down the main hallway past his bedroom door. Concerned for himself and his family, he fired several shots as the men ran by his bedroom.

---

1 All further statutory references are to the Penal Code unless otherwise stated.

2 An additional section 12022.53, subdivision (c) enhancement was alleged in count 2, but was subsequently dismissed.

Cervantes then grabbed a rifle and followed the men down the hallway. One of the intruders, Melendez, stepped out of the bathroom and pointed something at Cervantes. Cervantes opened fire and Melendez fled back into the bathroom and closed the door.

Herbert Arzaga, Cervantes's next door neighbor, was awakened by the sound of breaking glass. When he looked out the window, he saw Melendez climbing out of the Cervantes's bathroom window and taking off on foot. Arzaga called 911.

Police Officer Joseph Armijo responded to the scene immediately and spotted Melendez walking a short distance from the Cervantes home. Melendez had a gun in his hand and was wearing gloves and a bulletproof vest. When he was taken into custody, Melendez said he had been shot. He was transported by ambulance to the hospital where he was treated for several gunshot wounds.

A supervisor in the police department's crime lab processed the crime scene and found a nine-millimeter Luger shell casing and a live round in the bathroom. It was later determined both were ejected from Melendez's gun.

Melendez was questioned at the hospital six days after the incident. After being read his *Miranda*[3] rights, Melendez told Detective James Moore he broke into the house looking for money and cocaine. Melendez identified his crime partner as a man he knew only as "Squash."

Defense

Melendez testified in his own defense. He admitted breaking into the Cervantes' home, but that he did so under duress. Melendez also claimed he did not fire the gun he was carrying. According to Melendez, sometime prior to the incident, he met a man he knew as "Lil Rider," at a park and on several occasions used drugs with him. Melendez testified that, early on the morning of December 15, 2015, Lil Rider came to his home

---

3 *Miranda v. Arizona* (1966) 384 U.S. 436.

and forced him at gunpoint to go with him to the Cervantes' home. There Lil Rider provided Melendez with a handgun, a bullet-proof vest, and zip ties. Melendez was frightened of Lil Rider and felt he had no choice but to do as he said.

Melendez followed Lil Rider into the house and hid in the bathroom after being shot by Cervantes. He got out of the house by climbing through the bathroom window.

On cross-examination, Melendez admitted lying to Detective Moore when he identified his companion as "Squash." Melendez also insisted that he never fired the gun he was holding and had no explanation for the spent shell casing and bullet from his gun found in the bathroom.

DISCUSSION

I. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED MELENDEZ'S MOTION TO DISMISS THE JURY VENIRE?

Melendez contends he was denied his federal and state constitutional rights to due process of law and trial by a fair and impartial jury because of comments a prospective juror made during voir dire. While that juror was not seated, Melendez contends his statements likely influenced other jurors, such that the trial court should have granted his motion to discharge the jury venire. We disagree.

Background

After the jury panel was first sworn, the trial court asked if any of the prospective jurors knew the prosecutor, defense counsel, or Melendez, "simply based on the name of the case." Only one prospective juror raised her hand. Following the excusal of some prospective jurors, seven new prospective jurors were called for questioning, including Clayton Christiansen. Christiansen answered the standard questions posed, including the fact that he was a deputy probation officer for the county, who worked in post-release supervision. When asked, he explained that he was a juvenile correctional officer for six years prior to that. Through a series of questions, Christiansen stated that he was "familiar" with many people in other law enforcement agencies, but they were not "close

friends." He stated he had previously testified four or five times in court as part of his job. He stated he had never been assaulted while making an arrest. His wife had previously worked as a legal assistant in a civil law firm. Christiansen stated he had been arrested when he was 18 for throwing fireworks out of a car and was placed on court probation.

The trial court continued to briefly question other prospective jurors when Christiansen stated, "Your Honor, excuse me, may I just add a couple of things." The court replied, "go ahead, please." The following then ensued:

> "[Christiansen]: My brother also he was a correctional officer for the probation department for a couple of years and yesterday from the position I was sitting in [the audience when] you asked if we knew anybody here, I don't know Mr. Melendez but I recognize him.
>
> "[Court]: We'll talk about that in private but right now you say you don't think you know him?
>
> "[Christiansen]: Yes.
>
> "[Court]: We'll talk about that in private."

The trial court again briefly continued questioning prospective jurors and, before a break, again received assurances from the prospective jurors that they could follow the court's admonitions, including that they could follow the law, be fair to both sides, presume Melendez was innocent, and set aside biases or prejudice.

Out of the presence of the jury, the trial court questioned Christiansen about his possible recognition of Melendez. Defense counsel then made a motion to dismiss the jury venire, arguing that Christiansen, a deputy probation officer who was previously a juvenile correctional officer, interrupted questioning to say he might recognize Melendez, suggesting to the entire venire that Melendez had a juvenile record. Defense counsel argued Melendez could therefore not get a fair trial. The prosecutor countered that the mere fact that a probation officer recognizes a person "does not create an inference … [that the recognition] must be because the defendant has committed a crime." Instead,

the prosecutor argued, "[t]here are many ways that anybody can recognize anybody else and jumping to that conclusion" is unwarranted.

The trial court noted defense counsel's concern, but stated that "obviously as [the prosecutor] pointed out you can know people in different capacities, it doesn't have to be within his law enforcement capacity," even if the primary area of inquiry was about his work in the probation department. The trial court further stated:

> "[Christiansen] did premise what he started to say with his brother also working in corrections, juvenile corrections, but I don't think that was necessarily connected to what he ended up saying. I think he simply pointed that out and he forgot to tell us and then simply today which is understandable where he's in a little better position to look at Mr. Melendez and ultimately he did say I believe I recognize him, but he did also say he doesn't know him. [¶] And I appreciate an inference that could be drawn is that perhaps he knows him in his capacity as a—as a probation officer that is an inference but it's not the only inference and I appreciate however it is a negative inference but based on the fact he also says he doesn't know him and there's not going to be any further discussions about this. [¶] And plus usually I always tell the jurors but I'm not going to do it at this moment, but at some point I advise them that anything we talk about here is not evidence in the case, so whether somebody talks about a bad thing that happened to them it's not something you would be considering for purposes of this case. [¶] So I do appreciate [defense counsel's] concern, I just don't think it warrants a granting of a mistrial. I think ... Mr. Melendez will still be able to receive a fair trial and as I indicated it's simply an inference that can be drawn. [¶] The jurors we have discussed with them the need to decide this based solely on the evidence they receive in this case to which there has been none and so I'm going to deny your motion for a mistrial. I don't see what happened as constituting the basis for an entire new panel at this point and so I'm going to deny your request."

Christiansen was not questioned further by either counsel in open court, and neither prosecutor nor defense counsel attempted to remove him for cause. Defense counsel later peremptorily excused Christiansen from the panel.

Applicable Law and Analysis

A criminal defendant has the constitutional rights to a determination of guilt or innocence by a fair and impartial jury. (U.S. Const., 6th & 14th Amends.; Cal.Const., art.

I, § 16.) "[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*People v. Medina* (1990) 51 Cal.3d 870, 889.) "[S]uch a drastic remedy is [not] appropriate as a matter of course merely because a few prospective jurors have made inflammatory remarks." (*Ibid.*) Rather, "discharging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant." (*Ibid.*)

"Just as a finder of fact is in a better position than the reviewing court to judge the credibility of a witness, the trial judge is in a better position to gauge the level of bias and prejudice created by juror comments." (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1466.) Accordingly, the refusal to dismiss a jury panel is reviewed for abuse of discretion. (*Ibid.*; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 41–42.)

Here, the trial court did not abuse its discretion by failing to discharge the entire venire. As noted by both the prosecutor and the trial court, Christiansen's mere mention that he did not know Melendez, but recognized him did not mean that recognition necessarily came from Christiansen's position in law enforcement. Far more inflammatory comments have not warranted a discharge of the entire venire. [See, e.g., *People v. Martinez, supra,* 228 Cal.App.3d at pp. 1468–1473 [statements before venire that defendant, "who can't even speak English," was guilty because he was arrested and in court, which must mean prosecutor had a strong case]; *People v. Henderson* (1980) 107 Cal.App.3d 475, 493 [prospective juror revealed victim had been her recent psychotherapy patient]; *People v. Vernon* (1979) 89 Cal.App.3d 853, 865 [prospective juror stated defendant had been tried for raping her niece].)

Furthermore, during jury selection, the prospective jurors were repeatedly instructed on their duty to base a verdict solely on evidence presented during trial; the People's burden of proof; and that they must not be influenced by conjecture, passion, or

prejudice, and the trial court received assurances from the jurors that they would do so. These instructions were repeated after the close of evidence. We presume the jury followed the trial court's instructions. (*People v. Avila* (2006) 38 Cal.4th 491, 574.)

We find no abuse of discretion on the part of the trial court when it denied Melendez's motion to dismiss the venire. As such, his due process claim likewise fails. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.)

II. DID THE TRIAL COURT ERR WHEN IT INSTRUCTED THE JURY WITH CALCRIM NO. 361?

We next consider Melendez's contention that the trial court erred in instructing the jury with CALCRIM No. 361, as follows:

> "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

Background

After the jurors were instructed, a hearing was held outside the presence of the jury. The trial court put on the record a prior discussion between the court and counsel regarding CALCRIM No. 361. The court stated that, while the instruction, for reasons indicated in the bench notes, is rarely given, it chose to give the instruction over defense objection,

> "primarily based on the inability of Mr. Melendez to explain the empty cartridge shell casing on [*sic*] the bullet in the bathroom. There may have been other reasons as well, but [the prosecutor] felt this was appropriate."

Applicable Law and Analysis

Our Supreme Court recently explained the circumstances in which CALCRIM No. 361 is intended to apply. (*People v. Cortez* (2016) 63 Cal.4th 101, 117.) "[T]he

instruction applies only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge." (*Ibid.*) "Even if the defendant's testimony conflicts with other evidence or may be characterized as improbable, incredible, unbelievable, or bizarre, it is not, ... 'the functional equivalent of no explanation at all.'" (*Ibid.*) "[T]he focus of CALCRIM No. 361, as its language indicates, is not on the defendant's credibility as a witness, but on the role of a testifying defendant's failure to explain or deny incriminating evidence in how jurors 'evaluat[e] that evidence,' i.e., the evidence the defendant has failed to explain or deny." (*Id.* at p. 118.)

While not addressing the trial court's specific reasons for its ruling, Melendez contends that the trial court should not have given this instruction because "he did not fail to explain or deny any evidence which he could reasonably have been expected to deny or explain because of facts within his knowledge." We apply a de novo standard of review in evaluating Melendez's claim of instructional error. (*People v. Waidla* (2000) 22 Cal.4th 690, 733 ["Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact," and "[a]s such, it should be examined without deference"].)

Here, the evidence at trial was that a nine-millimeter shell casing and one live round was collected from the bathroom in the victim's home, the bathroom where Melendez locked himself in. The casing was the same brand as the ammunition found in Melendez's nine-millimeter semi-automatic handgun, and it was determined Melendez's gun had been fired and ejected the shell casing found in the bathroom. In addition, if a bullet was in the gun chamber and Melendez pulled the slide back, it would have ejected the live round contained in the chamber onto the bathroom floor.

Melendez, who admitted he was alone in the bathroom, was asked about this evidence while on the stand. He did not deny the bullet and casing were from his gun,

but denied manipulating the slide of his gun or firing his handgun at all. He also denied his cohort gave him an individual nine-millimeter bullet or a spent shell casing. Instead, Melendez testified he had no explanation for how a spent shell or nine-millimeter round matching his firearm could have been found in the bathroom.

Melendez contends that, while there were "significant differences" between his testimony and that of witnesses called by the prosecution, there were "no significant omissions" in his testimony. Respondent disagrees, contending Melendez completely failed to explain or deny how the incriminating evidence of the bullet or spent shell could have been found in the bathroom, when it appeared from the evidence that he could reasonably be expected to have that knowledge.

Even assuming arguendo the instruction should not have been given, it was harmless under any standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [beyond a reasonable doubt standard]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonably probable standard].) As explained in *People v. Haynes* (1983) 148 Cal.App.3d 1117, it is difficult to conceive of a situation in which giving CALCRIM No. 361 would materially affect deliberations: "In the typical case it will add nothing of substance to the store of knowledge possessed by a juror of average intelligence." (*Haynes, supra*, at p. 1120.) In other words, the instruction requires jurors to do nothing other than that which their oaths require of them. It generally reflects a common sense insight we would expect jurors to incorporate into their assessment of the defendant's credibility with or without this instruction.

As noted in *People v. Lamer* (2003) 110 Cal.App.4th 1463, although "courts have frequently found giving [the instruction] to constitute error, we have not found a single case in which an appellate court found the error to be reversible .... On the contrary, courts have routinely found that the improper giving of [the instruction] constitutes harmless error." (*Id.* at p. 1472.) And so it is here.

The evidence against Melendez was strong. He admitted to being a part of the robbery and of being in the bathroom. He was arrested shortly after the incident, carrying a gun and wearing a bulletproof vest. The bullet and shell casing found in the bathroom were determined to be from the gun Melendez had in his possession.

In addition, the impact of CALCRIM No. 361 was mitigated by the language of the instruction itself and the jury instructions as a whole. The instruction did not direct the jury to draw any adverse inferences, but left it to the jury to determine *if* defendant had failed to explain or deny evidence against him, and also to decide the "meaning and importance" of any such failure. It instructed the jury that the failure to explain or deny alone is not a sufficient basis upon which to infer guilt, and it highlighted the prosecution's burden to prove guilt beyond a reasonable doubt. (See *People v. Vega* (2015) 236 Cal.App.4th 484, 502.) The trial court also advised the jury that not all instructions were necessarily applicable and advised the jurors to follow the instructions that applied to the facts as they found them (CALCRIM No. 200), which mitigated any prejudicial effect related to CALCRIM No. 361. (*People v. Vega, supra,* at pp. 502–503.)

In light of the strong evidence of Melendez's guilt and the jury instructions as a whole, it is not reasonably probable he would have obtained a more favorable verdict had CALCRIM No. 361 not been given.

III. THE CASE MUST BE REMANDED FOR RESENTENCING

In supplemental briefing, Melendez contends this matter should be remanded to permit the trial court to consider whether to strike the section 12022.5, subdivision (a), firearm enhancement as it is now authorized to do by Senate Bill No. 620. Respondent concedes Senate Bill No. 620 should be applied retroactively to all nonfinal judgments, but argues remand for resentencing is unnecessary because the trial court "gave careful consideration to the sentence to be imposed and carefully crafted a total sentence that it felt was appropriate for the offenses and the offender," and it is "inconceivable" the trial

court would strike the section 12022.5 firearm enhancement on remand if given the opportunity. We find remand appropriate.

The jury found true various firearm enhancement allegations that Melendez personally used and discharged a firearm. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) On count 3, the principal term, the trial court imposed the middle term of six years, plus a maximum 10-year term for the section 12022.5, subdivision (a) enhancement, plus a middle term of two years for the section 12022.2, subdivision (b) enhancement. On count 2, the trial court imposed and stayed the middle term of two years, plus 10 years for the section 12022.53, subdivision (b) enhancement, and a middle term of two years for the section 12022.2, subdivision (b) enhancement. And on count 1, the trial court imposed and stayed the middle sentence of four years, plus the maximum 10-year term for the section 12022.5, subdivision (a) enhancement, and a middle term of two years for the section 12022.2, subdivision (b) enhancement.

At the time of sentencing, the trial court had no power to strike the firearm enhancements under section 1385. (See former §§ 12022.5, subd. (c) &12022.53, subd. (h).) However, on January 1, 2018, while Melendez's appeal was pending, Senate Bill No. 620 (2017–2018 Reg. Sess.) took effect, which gives trial courts the discretion to strike enhancements found true under section 12022.5 and 12022.53, in the interest of justice. (§§ 12022.5, subd. (c), 12022.53, subd. (h); see *People v. Watts* (2018) 22 Cal.App.5th 102, 119.) The judgment was not yet final in this case when Senate Bill No. 620 went into effect and so the changes in the statute effectuated by that bill apply retroactively to Melendez. (See, e.g. *People v. Chavez* (2018) 22 Cal.App.5th 663, 712.) Melendez has a right to have the trial court reconsider the enhancements in light of the new statute, unless the record shows that the sentencing court "'clearly indicated that it would not, in any event, have exercised its discretion to strike the [firearm] allegations'" had the court known it had that discretion. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081, citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*).)

In this case, the record does not clearly indicate the trial court would have declined to strike or dismiss the section 12022.5, subdivision (a) firearm enhancement if it had the discretion to do so at the time of Melendez's sentencing. Although the trial court stated it had given this case "great thought" and described the crime as the "ultimate nightmare," it nevertheless imposed the middle term on the principal count, giving weight to Melendez's relative youth and lack of serious criminal record. And, while it imposed a maximum 10-year term on the section 12022.5, subdivision (a) enhancement, it imposed the middle term for the section 12022.2, subdivision (b) enhancement, instead of the five years recommended by the probation department.[4]

Furthermore, the record does not contain any statement by the trial court indicating that it would have imposed the section 12022.5, subdivision (a) enhancement even if it had the discretion to strike or dismiss that enhancement at the time of Melendez's sentencing. In *Gutierrez,* cited by respondent, the trial court indicated that it would not have exercised its discretion to impose a lesser sentence even if it had the discretion to do so. First, the court imposed an upper term for the defendant's robbery conviction. (*Gutierrez, supra,* 48 Cal.App.4th at p. 1896.) Second, noting that the defendant was "'the kind of individual the law was intended to keep off the street as long as possible,'" the court chose not to strike either of two section 667.5, subdivision (b) enhancements. (*Gutierrez, supra,* at p. 1896.) Because the trial court imposed the maximum sentence on the defendant, *Gutierrez* concluded "no purpose would be served in remanding" for resentencing to allow the court to exercise its new discretion to strike or dismiss the three strikes allegation under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.) (*Gutierrez, supra,* at p. 1896.)

---

[4] It did the same as to counts 1 and 2, which were stayed, the only difference being the imposition and stay of section 120225, subdivision (a) in count 1, and section 12022.53, subdivision (b), in count 2.

Unlike the trial court in *Gutierrez*, the trial court in this case did not impose on Melendez the maximum sentence possible. Also unlike the trial court in *Gutierrez*, the court in this case did not state that Melendez should be "[kept] off the street as long as possible" or make any other statement clearly indicating that it would not have exercised discretion to strike or dismiss the section 12022.5, subdivision (a) enhancement even if it had the discretion to do so at the time of Melendez's sentencing. (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) Absent such a clear indication, the appropriate remedy is to remand for resentencing to allow the trial court to consider whether to exercise its discretion to strike or dismiss the section 12022.5, subdivision (a) enhancement. And while Melendez only argues that his case should be remanded because of the changes to section 12022.5, the jury also rendered true findings under section 12022.53, which, as we addressed above, was similarly amended. We therefore remand to allow the trial court the opportunity to exercise its informed discretion in deciding whether to strike one or more of the firearm enhancements imposed under sections 12022.5 and 12022.53.

DISPOSITION

The judgment of conviction is affirmed. The case is remanded for the trial court to exercise its discretion under section 12022.5, subdivision (c) and section 12022.53, subdivision (h). If necessary, an amended abstract of judgment is to be sent to the Department of Corrections.

_____
FRANSON, Acting P.J.

WE CONCUR:

_____
SMITH, J.

_____
SNAUFFER, J.